No. 85-21 (14)

MOTION FILED JAN 3 1986

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

SQUARE D COMPANY, et al.,

Petitioners,

—v.—

NIAGARA FRONTIER TARIFF BUREAU, INC., et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF AMERICAN INFORMATION TECHNOLOGIES CORP., BELL ATLANTIC CORP., BELLSOUTH CORP., NYNEX CORP., PACIFIC TELESIS GROUP, SOUTHWESTERN BELL CORP., US WEST INC. and their Telephone Operating Subsidiaries AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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Amici move the Court for leave to file an amicus brief in support of respondents. The proposed brief is included in this document. Counsel for petitioners have refused to consent to the filing of the brief.

Amici are the seven regional holding companies, formed in January 1984 as a result of the Bell System divestiture, and their telephone operating company subsidiaries. The principal business of these subsidiaries is to supply telephone and other telecommunications services throughout the country.

The business of providing telecommunications services is heavily regulated both at the federal level by the Federal Communications Commission ("FCC") and at the state level by state public utilities commissions. Most telephone facilities are used for both local and long distance intrastate calls and for long distance interstate communications, and, for the most part, intrastate services are regulated by state commissions and interstate ones by the FCC. Common carriers such as *amici** are required by the Federal Communications Act to file tariffs for all interstate common carrier communications services with the FCC, and the FCC has broad authority to investigate them, on its own motion or because of a third-party complaint, and to disallow provisions that are not "just, fair, reasonable and nondiscriminatory." While these tariffs are in effect, *amici* may not deviate from their terms in providing service to their customers. 47 U.S.C. § 201 *et seq.* *See American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978).

Pursuant to this regulatory scheme, *amici* have filed tariffs with the FCC that, for example, govern the access charges that

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* While the term "*amici*" is sometimes used to describe the regional holding companies and their telephone operating company subsidiaries collectively, the subsidiaries themselves, and not the regional holding companies, actually provide tariffed common carrier telecommunications services.

apply when long distance carriers require the use of their facilities for interstate calls. Other tariffs filed with the FCC cover dedicated or private line access and other services. Similar regulatory procedures govern the filing of tariffs with state public utilities commissions pursuant to statutes in the various states in which *amici* provide intrastate services.

On its face this case only involves the shipping business. The parties are shippers, motor carriers and a motor carrier rate bureau. The damages sought are for rates charged under tariffs filed with the Interstate Commerce Commission ("ICC"). The leading case that petitioners seek to overrule, *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), involved a claim by shippers against eight railroads for alleged overcharges in ICC-filed tariffs. Nevertheless, as this case was approached by the Second Circuit and as it has been argued by petitioners in this Court, the resolution of the case by this Court could have an enormous impact on firms outside the shipping industry, including telephone common carriers, such as *amici*.

Just like respondents, *amici* must file tariffs covering most of their services with the FCC and state regulatory bodies. *Amici* are then restricted in supplying services to the precise terms and conditions set forth in effective tariffs, and, in particular, the only rates they may charge are those in the tariffs. The FCC has broad authority to suspend, modify or disallow tariffs filed by *amici*, and in making decisions to approve or disallow tariffs, the FCC is governed by a broad public interest standard and must take into account a variety of factors in addition to free market considerations that underlie the antitrust laws. *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 93 (1953); *Hawaiian Tel. Co. v. FCC*, 498 F.2d 771, 777 (D.C. Cir. 1974). In addition, the users of *amici*'s services may petition the FCC to disapprove tariffs filed by *amici*, and they have done so on a number of occasions. *See, e.g., In re MTS and WATS Market Structure*, CC Docket No. 78-72, 67

F.C.C. 2d 1429 (1978); *In re Private Line Rate Structure and Volume Discount Practices*, CC Docket No. 79-246, 97 F.C.C. 2d 923 (1984).

Although the *Keogh* case and many of its progeny involved shippers and carriers of goods regulated by the ICC, its principles have been applied to similar treble damage claims brought by users of public utilities regulated by other federal regulatory bodies. *See, e.g.*, opinion below and cases cited therein, 760 F.2d at 1356. Accordingly, the continuing viability of *Keogh* is an extremely important issue to firms such as *amici*, because, if this Court were to overrule *Keogh*, depending on the grounds for overruling it, that act could have a dramatic impact on the telecommunications business by:

— Creating a whole new class of legal claims, i.e. treble damage claims by users of telecommunications services for alleged overcharges contained in effective tariffs that had not even been challenged in the FCC;

— Distorting the regulatory process, by creating an enormous incentive for users of regulated services to bypass the FCC with their complaints, by making it more likely that courts would make rulings on matters within the primary responsibility of the FCC and by creating a risk that enormous potential treble damage exposure may hamper the efforts of *amici* to comply with the policies of the FCC; and

— Subjecting telecommunications common carriers to unquantifiable additional monetary liability for providing service under tariffs not overturned by the FCC.

For these reasons, *amici* believe that they can assist the Court in its review of the legal issues involved in this case by

explaining the broader consequences that the decision in this case may have.

Respectfully submitted,

s/ J. PAUL MCGRATH

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QUESTION PRESENTED

Should the Court create a new class of lawsuits—treble damage actions by customers of federally regulated public utilities who complain about the rates they are charged under effective tariffs?

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INTEREST OF AMICI

The interest of *amici* has been set forth in the foregoing motion for leave to file this brief.

STATEMENT

Respondents are five Canadian trucking companies that ship goods between Ontario, Canada, and the eastern United States and their rate bureau, Niagara Frontier Tariff Bureau

("NFTB"). From as early as 1966 through 1981, the two petitioners claimed to have shipped goods between the U.S. and Canada on respondents' trucks at collectively established rates embodied in tariffs filed with the ICC by NFTB. NFTB is authorized by the ICC to engage in joint ratemaking under ICC supervision and in accordance with an ICC-approved ratemaking agreement. Pet. Cmplt. 8-9.

In 1983 the United States brought a civil antitrust action against respondents alleging that they had established tariff rates through procedures that violated their ratemaking agreement and that they had resorted to pressure and intimidation to prevent trucking companies from filing individual rates. The government action terminated in a consent decree that enjoined the conduct claimed to be illegal. *United States v. Niagara Frontier Tariff Bureau, Inc.*, 1984-2 Trade Cas. (CCH) ¶ 66,167 (W.D.N.Y. 1984).

Petitioners' complaints, which tracked the allegations of the government, sought treble damages on behalf of themselves and the thousands of others who shipped goods between the U.S. and Canada on the trucks of respondents and the other NFTB member carriers. Although damages were not specified, the complaint estimated that during the damage period NFTB carriers, including respondents and their co-conspirators, had international traffic revenues of $2.8 billion. The sole basis for damages alleged was that rates charged under tariffs were "at artificial and non-competitive levels". Pet. Cmplt. 11.

The tariffs in question were filed with the ICC, were fully effective under the Interstate Commerce Act and were used as the basis for charging all shippers. The ICC has full authority to disallow those tariffs prospectively or retroactively, *see ICC v. American Trucking Ass'ns*, 104 S.Ct. 2458 (1984), under a broad public interest standard contained in the governing statutes, which includes, but is not limited to, competitive considerations. *See, e.g.*, 49 U.S.C. §§ 10101, 10701(e), 10704(b). Petitioners have not asked the ICC to disallow the challenged tariffs, nor has the ICC done so on its own.

While the District Court dismissed the action in its entirety, 596 F. Supp. 153 (W.D.N.Y. 1984), the Second Circuit modified that result. 760 F.2d 1347 (2d Cir. 1985). The Court of Appeals remanded the case to the District Court to consider petitioners' antitrust injunctive claim against the alleged anticompetitive conduct and also to study whether petitioners could state an antitrust damage claim "for damages other than damages arising from the filed tariffs". 760 F.2d at 1366. The court ruled, however, that petitioners' damage claims based on effective tariffs were barred by the Court's decision in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922). Even though Judge Friendly opined "that much of the reasoning of *Keogh* seems outdated", *id.* at 1349, he also noted that *Keogh* "has frequently been cited by the Supreme Court with apparent approval", *id.* at 1356, and that all circuits have treated *Keogh* as controlling "with respect to rates for transportation or other services that have been filed with an appropriate federal agency as required by law" except in circumstances not relevant to this case, such as claims by competitors. *Id.*[1]

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1 The *Keogh* case itself involved a damage claim by a user of regulated services and not by a competitor of the regulated utility. This Court has not ruled on whether *Keogh* should be applied to claims by competitors. The amicus brief filed on behalf of C.D. Ambrosia Trucking Company and others urges the Court to consider this issue, because those companies are embroiled in litigation that raises it.

The considerations central to deciding whether users of utility services may sue to recover damages on account of effective tariffs may be somewhat different than those raised by claims of competitors. Indeed, some courts have concluded that such differences are sufficient to permit competitors to press damage claims when users could not. *See, e.g., Frontier Enterprises, Inc. v. Amador Stage Lines, Inc.*, 1985-2 Trade Cas. (CCH) ¶ 66,827 (E.D. Cal. 1985); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Essential Communications Sys. Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114, 1121-24 (3rd Cir. 1979). *But see City of Newark v. Delmarva Power & Light Co.*, 467 F. Supp. 763, 770-71 (D. Del. 1979); *McLeran v. El Paso Natural Gas Co.*, 357 F. Supp. 329 (S.D. Tex. 1972). On the other hand, in terms of possible distortion of the regulatory process, competitors' suits for damages based solely on effective tariffs raise many of the same concerns as suits by users. (See *infra*, pp. 15-21). Neither the record in this case, which involved a

Amici also provide services under tariffs that must be filed with an appropriate federal agency (the FCC) as required by law.[2] The FCC has authority to suspend, modify or disallow such tariffs, and may be influenced to take such action by complaints from users of *amici*'s services or *amici*'s competitors. As with the ICC, in deciding whether to disapprove tariffs, the FCC is governed by considerations going well beyond the free market goals of the antitrust laws. Yet, while such tariffs are in effect, *amici* may only offer the services covered on a non-discriminatory basis in accordance with their terms. *See* 47 U.S.C. § 201 *et seq*.[3]

The FCC is charged with supervision of *amici*'s activities with respect to interstate telecommunications and interstate access services. Any charges, classifications, practices, services and transmission facilities relevant to these activities are subject to tariff filing requirements. 47 U.S.C. §§ 152(b), 203; *see* 47 C.F.R. § 61.1 *et seq*. All such tariffs must be reasonable and non-discriminatory. 47 U.S.C. §§ 201, 202. No change in existing rates may go into effect without 90 days notice unless the FCC expressly provides for a shorter period. 47 U.S.C. § 203.

The FCC has the authority to suspend and investigate rates, on its own initiative and upon complaint. 47 U.S.C. §§ 204, 205. Moreover, the FCC must give such complaints preference

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judgment on the pleadings, nor the briefs of the parties supply sufficient background information to test this issue. The complexity of the cases that the C.D. Ambrosia Trucking Company *amici* are involved in, as spelled out in their amicus brief, indicates that the issue is a difficult one that may be ripe at some later date.

2 Indeed, the Federal Communications Act was modeled after the Interstate Commerce Act. *Essential Communications Sys. Inc. v. American Tel. & Tel. Co.*, 610 F.2d 1114 (3d Cir. 1979).

3 *Amici*'s intrastate services are regulated by state public utilities commissions, and typically are subject to the same kind of tariff mechanism as the FCC scheme. To the extent that these activities raise antitrust immunity or similar issues, they are governed by the so-called state action doctrine and not by *Keogh*. *See, e.g., Southern Motor Carriers Rate Conference, Inc. v. United States*, 105 S.Ct. 1721 (1985).

over all other matters pending before it. 47 U.S.C. § 204(b). Any carrier which seeks to increase its rates bears the burden of proof in showing that the increase serves the public interest. 47 U.S.C. § 204.

The FCC's evaluation of a rate includes, but is not limited to, competitive issues. The agency must also consider safety, efficiency, allocation of rate burden, financial integrity of carriers and any other factor relevant to the public interest. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716 (9th Cir. 1981), *cert. denied*, 459 U.S. 1145 (1983). Should the FCC disallow a rate, it has the duty and sole authority to establish a rate which would serve the public good. 47 U.S.C. § 205. Finally, a user may obtain a refund of any unjustified charge paid or actual damages, plus reasonable attorneys fees, through a proceeding in court or before the FCC. 47 U.S.C. §§ 204(a), 206.

Summary of Argument

In *Keogh* and in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), the Court did not grant immunity to the carriers. To the contrary, it expressly ruled that railroads were not immune from the antitrust laws and that anticompetitive misconduct would subject them to criminal or civil government proceedings and to private injuntive actions. The Court further ruled, however, that customers of common carriers could not sue for antitrust treble damages on account of effective tariffs or to enjoin the use of such tariffs. Such relief could be obtained only under the regulatory scheme. The limitation on available remedies was based on the Court's understanding of what accommodation between the two statutes was necessary to effectuate the Congressional intent.

The *Keogh* rule has been uniformly followed by the federal courts for over six decades. During those years, Congress has specifically focused on *Keogh* and *Georgia* in formulating legislation on regulatory immunity but has not evidenced the slightest intention of overruling or limiting the *Keogh* doctrine.

In particular, Congressional action in passing the Reed-Bulwinkle Act and the Motor Carrier Act of 1980 more likely evidence acquiescence in, or ratification of, *Keogh* than an intent to overrule it. Even if the Court were to hold that one or both of these statutes overruled *Keogh* by implication as to the trucking industry, however, they would not provide a basis for overruling *Keogh* as to other federally regulated carriers.

Creating a treble damage action for users of federally regulated services would have a substantial negative impact on the regulatory process itself and on federally regulated firms. The lure of treble damages would create a strong incentive for customers with complaints about common carrier tariffs to bypass the regulatory agency, to let time pass so that damages would accrue and then to go to court. If the magnitude of such cases was large, there would be a substantial risk that courts would decide the legality of such tariffs differently than the regulators or that this would create a cumbersome situation in which many primary jurisdiction referrals would be necessary. In addition, a threat of very large dollar exposure would influence regulated companies to take the safest possible competitive approach in formulating their tariff filings, regardless of their customers' needs and despite the stated policy of the regulatory agency.

If *Keogh* is to be overruled, Congress should do it. No real case has been made for creating this new treble damage cause of action. Congress has been fully aware of this well-settled rule for decades, and has passed immunity legislation against the *Keogh* backdrop. Moreover, such a ruling would be inconsistent with the current trend in Congress to restrict the treble damage remedy. In fact, Congress is currently studying a bill which would further limit the treble damage remedy in cases such as the present one, where claims are made against foreign corporations based on international transactions.

ARGUMENT

I.

KEOGH DOES NOT CONFER ANTITRUST IMMUNITY BUT ONLY BARS A USER OF A REGULATED UTILITY'S SERVICES FROM PURSUING TREBLE DAMAGE CLAIMS UNDER CERTAIN CIRCUMSTANCES.

Keogh and its progeny crafted a narrow, finely drawn exception to the antitrust laws' general applicability to business firms. In *Keogh*, a shipper complained to the ICC of allegedly anticompetitive freight rates filed by railroad carriers and sought to have the rates disallowed. The ICC suspended the rates pending investigation, held hearings to determine whether the rates were reasonable and nondiscriminatory, and subsequently approved the rates. The shipper then brought its claims to federal court, seeking treble damages and insisting that the rates were anticompetitive in violation of the Sherman Act. 260 U.S. at 159-60.

The Court recognized that the United States could challenge anticompetitive conduct by the carriers in an injunctive action under the Sherman Act, thus making it clear that the defendants were not immune from the antitrust laws. *Id.* at 161-62. But an antitrust damage claim by shippers was another matter. Justice Brandeis examined Congress' intent under the Interstate Commerce Act and the Sherman Act[4] and determined that shippers had no cause of action to sue for antitrust treble damages on account of rates in tariffs lawfully in effect under the Interstate Commerce Act. The Court made it clear that shippers simply had not suffered "injury" under the antitrust laws for rates in tariffs not disallowed by the ICC. *Id.* at 162-63.

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4 Keogh sued under § 7 of the Sherman Act, which provided for a private treble damage remedy to one "injured in his business or property" by a violation of the antitrust laws. Section 7 of the Sherman Act has since been repealed, ch. 283, § 3, 69 Stat. 283 (1955), but § 4(a) of the Clayton Act contains essentially the same provision. 15 U.S.C. § 15(a).

Justice Brandeis spelled out several grounds for the Court's holding. Central to his reasoning were conclusions that Congress had not intended that the additional treble damage remedy be permitted in these circumstances; that permitting such a remedy would necessarily result in a court speculating as to what the ICC would have decided under the Interstate Commerce Act; and that there was no effective way for an antitrust court to refer Interstate Commerce Act questions to the ICC so as to avoid conflicts on such factual issues. *Id.* at 160-64. Justice Brandeis explained that it could be impossible for a court to decide what lower rate could have been charged as a legal, non-discriminatory rate in the absence of an unlawful conspiracy, because such a lower rate might not legally be maintained "without reconstituting the whole rate structure for many articles moving in an important section of the country." *Id.* at 164.

Although this Court in *Keogh* disallowed a treble damage claim based on effective tariffs, the Court expressly noted that other remedies were available to combat anticompetitive conduct by carriers. Making it clear that anticompetitive conduct by the railroads was not protected by antitrust immunity, the Court observed that:

> "under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6."

260 U.S. at 161-62.

Twenty-three years later, in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945), while expressly reaffirming the holding in *Keogh*, the Court ruled that private parties could also maintain injunctive actions under the antitrust laws to enjoin "the alleged rate-fixing combination and conspiracy among the defendant carriers." *Id.* at 455-56. The only limitation on such an injunctive action was that a court could not suspend or

terminate the operation of an effective tariff itself; only the regulatory agency could so act. *Id.* at 454-55.

Against this background, it is difficult to understand why petitioners' brief talks so much about immunity. The rate-making conduct of the trucking companies was not immunized from antitrust scrutiny by the *Keogh* decision. In *Keogh*, the Court recognized that even specific ICC approval of the tariffs in question would not bar the government from instituting enforcement proceedings against the carriers. 260 U.S. at 161-62. The singular import of the *Keogh* decision was to deny treble damage claims to shippers who allege injury resulting from a filed tariff rate. 260 U.S. at 162-63.[5]

In this case, the Court is not being asked to confer antitrust immunity upon all rate making conduct of a carrier which results in filed tariffs. The prior government case and the consent decree entered into by the United States and respondents show that, if respondents unlawfully restrain competition, they are subject to antitrust censure. This appeal presents the Court solely with the question of whether an additional remedy—a treble damage claim by users complaining about tariff charges—should be created to supplement remedies historically permitted.

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5 It was clear well before *Keogh* that railroads are subject to the antitrust laws and that general antitrust immunity would not be implied for them. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897). This was reaffirmed in *Keogh* and *Georgia*. It was for that reason that Congress has, on several occasions, enacted legislation providing for varying degrees of express immunity for the transportation industry. *See, e.g.*, Reed-Bulwinkle Act, Pub.L. No. 80-662, 62 Stat. 472 (1948). Over the years the Court has considered whether implied antitrust immunity might be proper for other industries, given the regulatory statutes that Congress had enacted for them and the specific factual circumstances of the case. Those decisions turned on a particular analysis of the industry in question and of the regulatory regime enacted by Congress. *See, e.g., United States v. NASD*, 422 U.S. 694 (1975); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); and *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). In this case, implied antitrust immunity issues are not raised as to transportation or any other industry.

II.

KEOGH'S DETERMINATION THAT THE USERS OF REGULATED SERVICES HAVE LIMITED ANTITRUST REMEDIES HAS NOT BEEN OVERRULED BY THE COURTS OR BY CONGRESS.

In *Keogh* the Court construed two federal statutes and, based on its understanding of Congressional intent, held that users of regulated services had limited antitrust remedies. Since this Court achieved that accommodation of the antitrust and regulatory schemes in *Keogh* some 63 years ago, the governing principles have not been disturbed by the courts or by Congress.[6]

Later court decisions show that *Keogh* indeed represents a narrow type of antitrust exception. The *Keogh* decision was expressly reaffirmed in *Georgia v. Pennsylvania R.R.*, 324 U.S. 439 (1945). The *Georgia* opinion emphasized that *Keogh* does not represent the grant of a wholesale antitrust immunity to carriers that file tariffs with the ICC. Instead, in *Georgia* the Court ruled that purchasers of services from regulated carriers could seek monetary remedies for filed tariff rates only before the ICC under the Interstate Commerce Act. Should the purchaser wish to seek injunctive relief, however, its remedy

6 The *Keogh* rationale has frequently been cited with approval in cases dealing with questions of "implied immunity" or "primary jurisdiction", issues not raised in this case. *See, e.g., United States v. RCA*, 358 U.S. 334 (1954) (given pervasive regulatory scheme of FCA, courts will defer to FCC's primary jurisdiction); *Pan American World Airways, Inc. v. United States*, 371 U.S. 296 (1963) (where CAB has been granted authority to award injunctive relief with respect to particular questions involving antitrust considerations, courts will not intercede); *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (purchasers may not seek treble damages or injunctive relief for fixed commission rates, the establishment of which is actively overseen and approved by SEC); *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232 (1980) (court's jurisdiction over antitrust action need not be impaired even though available remedies are limited to injunctive relief).

lies with the federal courts for the ICC does not possess the necessary authority to enjoin conspiratorial activity.

Georgia is important because in his opinion Justice Douglas spelled out what kind of an accommodation the Court was reaching between the regulatory and the antitrust schemes. Georgia claimed that 20 railroads had conspired to fix arbitrary and noncompetitive rates and charges for transportation of freight by railroad to and from that state. What was claimed to be illegal was that the railroads had utilized a complex series of private conferences and rate bureaus and other collective efforts at regimentation that were not contemplated by the Interstate Commerce Act and were unlawful under the antitrust laws.

Under the regulatory scheme, there were certain things the ICC could not do, such as obtaining an order against anticompetitive future joint action. In such a circumstance the Court ruled that it was proper for a private party to sue under the antitrust laws to obtain such an injunction. *Id.* at 455-59. In addition, the Court quoted language from *Keogh* as to the permissibility of government civil or criminal antitrust actions. But there were two remedies the Court would not permit to Georgia. It could not sue for damages under the antitrust laws, and it could not obtain an order setting aside a tariff within the jurisdiction of the ICC. *Id.* at 453-54. This result was reached because of the Court's assessment of what Congress had sought to accomplish in enacting the two different statutory schemes even though the rates in question had not been specifically approved by the Commission after hearings. Damages or disallowance of tariffs would only be available under the regulatory scheme.

As Judge Friendly noted in the decision below, 760 F.2d at 1356, the courts have uniformly applied the principles of *Keogh* to damage claims by users of utility services concerning rates for transportation and other services that have been filed with an appropriate federal agency as required by law and

where the agency itself had not questioned their lawfulness[7]. This rule has been uniformly followed by all federal courts, so far as research to date has been able to indicate.[8] Thus through almost the entire history of the antitrust laws this broad area of potential treble damage claims has been specifically disallowed.[9]

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7 *See, e.g., Minsky v. Auto Driveway Co.*, 757 F.2d 718 (7th Cir.), *cert. denied*, 105 S.Ct. 435 (1984); *In re Wheat Rail Freight Rate Antitrust Litigation*, 759 F.2d 1305 (7th Cir. 1985); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921, 929 (2d Cir. 1981); *Asbury Graphite, Inc. v. Dehyco Co.*, 1980-1 Trade Cas. (CCH) ¶ 63,980 (N.D. Cal. 1980).

8 So far as we can determine no court has seriously questioned the continued vitality of *Keogh*'s actual ruling and, moreover, it has been applied to bar damage claims in cases where antitrust issues are not even raised. In a recent decision, *Nordlicht v. New York Telephone Co.*, 617 F. Supp. 220 (S.D.N.Y. 1985), the court invoked *Keogh* to dismiss a user's claim for money had and received based upon filed tariffs. The court stylized the *Keogh* rule as the "filed tariff doctrine" and explained:

> "The existence of a filed tariff essentially neuters any claim plaintiff might have that the utility's adherence to the rate is improper or inequitable. The filed tariff doctrine defines such a rate as wholly proper. . . . So long as defendant provided the requisite service, it was lawfully entitled by those tariffs to charge those rates. The filed tariff doctrine thus insulates defendant from any equitable claim that its charging these rates was improper."

Id. at 227 (footnote omitted). Furthermore, the court recognized that *Keogh* did not immunize a regulated utility from all liability. *Id.* at 226 n.4. *See also Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) (holding that "filed rate doctrine" precluded recovery of damages based upon difference between contract rate and tariff rate).

9 Contrary to petitioners' argument, this Court's decision in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), did not overrule *Keogh*. *Carnation* did not discuss or even mention *Keogh*. *Carnation* only held, on the basis of the particular statutory scheme governing the Federal Maritime Commission ("FMC"), that the FMC's regulatory authority was not sufficiently pervasive to invoke a *Keogh*-type rule, and, accordingly, a shipper aggrieved by collective tariff rates filed with the FMC could seek antitrust damages.

In *Carnation*, the shipper claimed that the carriers had put their rate agreement into effect in direct contravention of the governing legislation, the Shipping Act of 1916. Unlike the Interstate Commerce Act, the Shipping Act then effective made the FMC's express approval of tariff rates a mandatory prerequisite to their implementation. See 46 U.S.C. § 814 (1958). Furthermore, the regulatory scheme imposed by the Shipping Act was much less extensive than that created under the ICA, particularly in the area of rate-making. In particular, the FMC was not accorded the power to extensively regulate rate competition as was the ICC and, consequently, its authority to award reparations was limited. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1362-64 (2d Cir. 1985) (comparing Shipping Act provisions with parallel mandates of the ICA).

Petitioners attempt to sidestep all this history by arguing that this Court's opinion last year in *I.C.C. v. American Trucking Ass'ns*, 104 S. Ct. 2458 (1984), proves that *Keogh* has been "supplanted." Brief for Petrs. at 32. There the Court noted that "whenever the [ICC] finds an effective tariff unlawful, injured parties can recover both damages under § 11705(b)(3) and whatever additional amounts the antitrust laws allow." *Id.* at 2462. Although the scope of the damage remedy that exists under these circumstances was not fully delineated, it is clear that the Court did not indicate any intention to overrule *Keogh*.

Congress has done nothing to upset the Court's work. It has long known and focused upon the *Keogh* limitation on treble damage claims. Certainly, Congress has never in any way, shape or form expressed any displeasure with *Keogh*, and based on Judge Friendly's review of legislative history, *see* 760 F.2d at 1357-1360, it is not an overstatement to say that in enacting the Reed-Bulwinkle Act[10] Congress acquiesced in the *Keogh* doctrine because it did not want to destroy the balance between regulatory and antitrust enforcement embodied in *Keogh* and *Georgia*.

When Congress enacted the Reed-Bulwinkle Act in 1948, the *Georgia* case was not a peripheral player; it was center stage. *See* 760 F.2d at 1358-60. Congress was deeply concerned that the exposure of the industry to antitrust actions could have a troublesome impact on transportation policy, and its response was to grant joint conduct by carriers and rate bureaus antitrust immunity under certain conditions. As Judge Friendly noted, however, Congress was fully aware that *Keogh* also

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10 Pub. L. No. 80-662, 62 Stat. 472 (1948).

barred antitrust damage claims for overcharges in effective tariffs but gave no hint of any intention to overrule this aspect of *Keogh* or *Georgia*. As he put it, "it is somewhat difficult to suppose that an act for relief of railroads silently operated against them in so material a respect." 760 F.2d at 1359.

To the contrary, Congress enacted Reed-Bulwinkle on the clear assumption that *Keogh* and *Georgia* expressed a long-standing rule that was part of the antitrust/regulatory accommodation which it was shaping.

Similarly, the 1980 amendments to the Interstate Commerce Act,[11] while fostering a more competitive climate in the motor carrier industry, do not impair the *Keogh* rule. All carriers still must file tariffs with the ICC. 49 U.S.C. § 10761. Agreements between carriers to act collectively must also be submitted to the ICC. 49 U.S.C. § 10706(b)(2). The ICC, on its own motion or upon complaint, has sole authority to determine the lawfulness of tariffs. 49 U.S.C. § 11701; *Burlington Northern Inc. v. United States*, 459 U.S. 131 (1982). Evaluation of any tariff necessarily entails consideration of competitive effects within the "reasonable and non-discriminatory" standard. *See* 49 U.S.C. §§ 10101, 10704, 10706(b)(2), (c)(2), (f)-(h). The power to disallow a tariff rate lies exclusively with the ICC and, once a rate is disallowed, the ICC must prescribe a new rate, again utilizing the public interest yardstick. 49 U.S.C. § 10704. Finally, any shipper proving injury from an unlawful tariff rate may recover actual damages or overcharges plus attorney fees. 49 U.S.C. § 11705 (b), (d)(3); *see ICC v. American Trucking Ass'ns, supra*. Accordingly, nothing in the 1980 amendments destroys the remedy afforded the shipper in *Keogh* under the regulatory regime, nor is there any indication that Congress intended to provide the shipper with a new remedy outside the scope of the ICA.

Even if the Court were to find by implication a Congressional intent to overrule *Keogh* as to the trucking industry in

11 Pub. L. No. 96-448, 94 Stat. 1898 (1980).

the Reed-Bulwinkle Act or in the 1980 amendments to the Interstate Commerce Act, the Court should not conclude that *Keogh* was thereby overruled as to other regulated industries. There is nothing in the legislative history that would even suggest such an intent.

III.

JUDICIAL EXTENSION OF THE TREBLE DAMAGE REMEDY TO PLAINTIFFS IN *KEOGH*-TYPE SITUATIONS WOULD HAVE A NEGATIVE IMPACT ON THE REGULATORY PROCESS AND ON REGULATED FIRMS.

Petitioners place considerable reliance on Judge Friendly's conclusion that *Keogh's* theoretical underpinnings have been undermined by subsequent developments in the judicial and regulatory arenas. See 760 F.2d at 1352-54. Thus they urge the Court to decree a substantial expansion of the treble damage remedy as a matter of regulatory policy and the public interest. In doing so, however, they ignore the kind of substantive impact that such a change in the law would have.

A distillation of the factual scenario present in *Keogh* demonstrates that similar disputes are susceptible to frequent occurrence in the context of several federally regulated industries, not just the motor carrier and other ICC-regulated industries but also in areas such as telecommunications. First, a regulated firm files a tariff in substantial compliance with the regulatory procedural requirements—a tariff which reflects the carrier's perception of the regulator's public interest goals. The regulator has full authority to disallow the tariff if it does not meet the statutory "public interest" requirements and may institute a proceeding to do so on its own motion or at the suggestion of a third party. Next, the tariff becomes effective. Subsequently, a user that has not achieved the result it desired before the agency or that decided simply to ignore the regula-

tory process in its entirety goes into federal court in the hope of recovering treble damages, probably for itself and classes of other users, based upon a tariff which has never been disallowed or even questioned by the agency charged with the primary responsibility to supervise, approve and reject such tariffs.

If the Court now for the first time were to fashion such a cause of action, the lure of treble damages and attorney's fees would create a potent incentive for customers of regulated utilities to bypass the regulatory process and, instead, to seek redress in the federal courts. Entrusting the federal courts with the duty to determine whether tariffs are lawful would directly contradict this Court's oft-repeated pronouncement that the ICC is charged with the preeminent authority to supervise, approve and, if necessary, prescribe tariff rates. *See Burlington Northern, Inc. v. United States*, *supra*; *ICC v. American Trucking Ass'ns*, *supra*. Although Congress dictates the parameters within which the ICC acts, it is the ICC's duty to ensure that tariff rates reflect the national transportation policy. *See Gulf States Util. Co. v. Federal Power Comm'n*, 411 U.S. 747 (1973); *ICC v. American Trucking Ass'ns*, *supra*.

Such a change in the law would also create friction with the scheme Congress has established for telecommunications regulation. Congress has determined that national communications policy should strive "to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges . . ." and has endowed the FCC with the authority to carry out this policy. 47 U.S.C. § 151. The question whether a carrier's filed tariff rate advances the public interest, as set forth above, is entrusted to the "deposit of [the FCC's] experience, the disciplined feel of the expert." *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 91 (1953); *see also FCC v. WNCN Listeners Guild*, 450 U.S. 582, 596 (1981) (FCC's judgment regarding how the public interest is best served is entitled to substantial

judicial deference); *United States v. RCA*, 358 U.S. 334, 348 (1959).

The FCC must wade through a labrynth of factors to make such a determination and "encouragement of competition as such has not been considered the single or controlling reliance for safeguarding the public interest." *FCC v. RCA Communications, Inc.*, *supra* at 93; *Hawaiian Tel. Co. v. FCC*, 498 F. 2d 771, 777 (D.C. Cir. 1974). Even today, after the entry of the Modification of Final Judgment in *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 231 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983), the FCC cannot evaluate a tariff solely with an eye towards encouragement of competition but must be guided by the preservation of universal service as its overriding principle. *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224, 1225 (1985). The FCC must also strive for the elimination of undue preferences among rates for interstate services, the efficient use of local networks, prevention of uneconomic bypassing of common carrier facilities and stimulation of competition. *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, *supra*; *In re Private Line Rate Structure and Volume Discount Practice*, 97 F.C.C. 2d 923 (1984).

Elements of tariff rates must reflect the carrier's cost characteristics and pricing convenience for both the carrier and customer as well as market demand. *In re Private Line Rate Structure and Volume Discount Practice*, *supra* at 934, 941. Moreover, the rapid advance of telecommunications technology further complicates FCC supervision of tariffs. *See, e.g., Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 461 U.S. 938 (1985) ("*Computer II*"). In *Computer II*, the Court of Appeals entertained a challenge to an FCC ruling that "enhanced services", consisting of combined data processing and com-

munications services, were not common carrier services within the intendment of the Federal Communications Act and, therefore, were not within the ambit of the agency's regulatory authority. The Court upheld the FCC's determination, recognizing that the agency must facilitate technological advancement within the field of telecommunications in order to serve the public interest.

The issue before this Court becomes more worrisome because, as contemplated by various federal regulatory acts, tariffs that are indisputably reasonable and nondiscriminatory, and therefore in the public interest, may seem anticompetitive to some extent.[12] Although, pursuant to 15 U.S.C. § 21(a), the ICC, as well as the FCC and the FTC, is statutorily mandated to enforce the Clayton Act's prohibitions against discrimination in prices, services and facilities, and against tying arrangements and monopolistic mergers, an agency may give less emphasis to these prohibitions if the regulatory act so indicates. An antitrust court may not have such discretion. True, the court may seek to minimize the risk of such a clash by a primary reference to the agency, but this is, at best, a cumbersome and time-consuming mechanism and, at worst, an involuntary diversion of agency resources.

As this Court recently noted, the ICC also has broad discretion to fashion remedies and certainly can provide adequate relief to an injured shipper. *ICC v. American Trucking Ass'ns*, *supra*. Contrary to petitioners' protestations, the ICC is well-equipped to hear and determine their claims. Although

12 The FCC, for example, has ordered all telephone exchange carriers to set certain of their rates to long distance carriers based upon nationally averaged costs. As a result, exchange carriers must frequently impose rates either substantially below or above their own costs. Moreover, the revenues from these services must be pooled and allocated among the exchange carriers in proportion to their actual costs. These arrangements could arguably have anticompetitive effects. *See generally* 47 C.F.R. § 69 (1984). However, the FCC has concluded that they are in the public interest in spite of such possible effects.

the agency cannot review every tariff that is filed, its 1984 Annual Report indicates declining growth in the number of tariff filings. 1984 ICC Ann. Rep. 17-18. More significantly, litigation over rate matters has abated, with less than 20 shipper complaints filed during 1984. *Id.* at 17, 48. In 1984, 6,347 rate cases were settled through the ICC's informal dispute procedures, leaving only 67 pending at year end. *Id.* at 71, 109. Only .007 percent of the 1,250,000 tariffs filed were protested, and all such protests were heard. *Id.* at 70-71. Accordingly, shippers who are vigilant of their rights can seek and obtain full consideration through the ICC.

The FCC is similarly endowed with far-reaching latitude to remedy inequities. *See* 47 U.S.C. § 203 *et seq.*; *National Ass'n of Regulatory Util. Comm'rs v. FCC*, *supra*; *Computer II*, *supra*. Despite its broad discretion, however, one mandate remains clear: the FCC may not abolish the requirement that common carriers file tariffs. *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985). The agency itself had previously noted:

> "There can be no question that tariffs are essential to the entire administrative scheme of the [Federal Communications] Act. . . . The importance of tariffs and the requirement that common carriers—*all common carriers—must offer all of their communications services to the public through published tariffs* is well established . . . *The [FCC] has no authority to ignore [this command] even if market forces are present which undercut the 'national monopoly' justification for regulation.*"

Id. at 1192-93 *quoting In re Western Telegraph Co.*, 75 F.C.C. 2d 461, 474 (1980) and Brief of FCC at 49-50, *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) (emphasis added) (citations omitted). *See also ICC v. American Trucking Ass'ns*, *supra* at 2472 (O'Connor, J., dissenting) (Congress intended that transportation carriers rely on tariffs and, in fact, industry revolves around them).

Finally, new exposure to liability for treble damage awards to all of a carrier's users may well distort the carrier's decision-making process in formulating its tariffs. The initiation of tariffs by carriers is basic to the regulatory process. The specter of financial disaster from treble damages to a potentially huge plaintiff class may influence the carrier to make the safest filing from an antitrust standpoint although regulatory policy—communicated through published decisions or less formally—may indicate that such filings are not in the public interest.

The complexity of any judgment concerning the impact of a treble damage remedy upon a carrier's rate-making process warrants extensive consideration by Congress. The broad spectrum of legal commentary on the economic efficacy of treble damages in any context heightens this concern. Many commentators have challenged the remedy's deterrent value and question whether government enforcement and penalty provisions, premised upon economic evaluation of the loss to society, would yield greater economic efficiency. *See, e.g.*, K. Elzinga and W. Breit, The Antitrust Penalties: A Study in Law and Economics 112-138 (1976); Blair, *Antitrust Penalties: Deterrence and Compensation*, 1980 Utah L. Rev. 57; Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. Chi. L. Rev. 467 (1980). Others contend that the punitive effects of treble damages over-deter possibly beneficial conduct, resulting in unnecessary restriction of output, and that the trebling of damages should be discretionary with the court. P. Areeda & D. Turner, Antitrust Law, ¶ 331b (1978). *Cf.* Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 Seton Hall L. Rev. 17 (1983) (asserting that treble damages are the most potent instrument to deter anticompetitive conduct). The intricacy of this evaluation becomes even more entangled in the regulatory arena where Congress has determined that the optimal allocation of economic resources may require some restraint upon competitive forces so that a public utility can best serve the public.

It cannot be known how extreme would be the impact of overruling *Keogh*, since it has been a fixture on the legal landscape for so long. There would undoubtedly be cases brought by users and classes of users against various federally regulated utilities on account of their tariffs. The extent to which such claims would succeed and the scope of the utilities' liabilities would not be known for years. The uncertainty this would create for regulated firms cannot be estimated in advance, but it can be predicted that the cases would have a substantial impact on the operation of several federal regulatory schemes. This is because firms threatened with the enormous exposure of treble damages for their alleged anticompetitive conduct and subject to the not necessarily consistent decisions of several hundred federal judges (not to mention juries) would be affected in their decision-making, and this would influence them to be less mindful of other public interest policies the regulatory agencies may wish to advance.

In short, there is strong evidence that the *Keogh* accommodation is still viable today, although, perhaps, for slightly different reasons than those articulated by Justice Brandeis in 1922. It is also fairly clear that overruling *Keogh* would have a large substantive impact. On the other hand, the *Keogh* rule has not permitted regulated firms to avoid the rigors of the antitrust laws. In the matter at bar, for example, the consent decree in the government action has already permitted antitrust goals to be achieved without disrupting the regulatory process.

IV.

IF KEOGH IS TO BE OVERRULED, CONGRESS SHOULD DO IT.

In deciding whether to overrule one of its prior decisions, the Court must frequently balance a variety of factors. In this case, the Court is asked to create a new cause of action for treble damages—a step which would almost certainly spawn significant amounts of new litigation and have a substantive impact on the regulatory process. This it should not do.

Keogh has been well-settled law for more than a half century. Congress has been aware of it, has legislated with it in mind, and yet has never found fault with it. Moreover, *Keogh* itself has rarely been criticized by courts or commentators, probably because it is a sensible accommodation between various federal regulatory regimes and the antitrust laws. Where antitrust immunity does not apply but the regulator has broad control over tariffs, *Keogh* permits government antitrust suits of all kinds and private antitrust suits for injunctive relief. On the other hand, for monetary relief or tariff disallowance, users must look to the regulatory process. Perhaps the proof that this system has been a sensible accommodation is that petitioners point to no evidence of its failure. They assert that change is necessary but make no showing of such need.

Moreover, it would be inappropriate for the Court after all this time to create a new treble damage cause of action for users of utility services at a time when Congress has been amending the treble damage remedy to define and to narrow its reach. In the past few years, Congress has refined and cut back antitrust remedies—particular treble damage remedies—on several occasions, including the Export Trading Company Act,[13] the Productivity and Innovation Act of 1984 (dealing with joint research and development ventures),[14] and the Local Government Immunity Act of 1984.[15]

Many more suggestions for such reform have been made and some have been the subject of extensive hearings. One of the most serious of these efforts in this Congress is S. 397, 99th Cong., 1st Sess. (1985), the Foreign Trade Antitrust Improvements Act of 1985. It is particularly relevant to this case, in that it would seek to minimize the conflict between this country and its trading partners by reducing treble damage exposure in cases of foreign commerce, such as the present in which *all* the

13 Pub. L. No. 97-2920, 96 Stat. 1246 (1982) (codified at 15 U.S.C. § 4001 *et seq.* (1984).

14 Pub. L. No. 98-462, 98 Stat. 1815 (1984) (codified at 15 U.S.C. § 4301 *et seq.* (1984)).

15 Pub. L. No. 98-544, 98 Stat. 2750 (1984) (codified at 15 U.S.C. § 34 *et seq.* (1984)).

defendants are foreign firms and *all* of the commerce in question is international. *See* 131 Cong. Rec. S1160 (Feb. 6, 1985) (Statement of Senator DeConcini).[16]

CONCLUSION

Keogh and its progeny are a sensible reconciliation of potentially conflicting statutory mandates. Even if the Court would be inclined to decide *Keogh* differently today, however, it would not be appropriate to overrule *Keogh* given the legislative history as to *Keogh* itself and recent Congressional activity in the antitrust remedy area.

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16 During the past few years cases such as *In re Uranium Antitrust Litigation*, 617 F.2d 1248 (7th Cir. 1980), have led to enormous friction with our trading partners, including Canada. To some extent this friction hopefully has been alleviated by bilateral agreements such as the March 9, 1984, U.S.-Canada Antitrust Accord, 5 Trade Reg. Rptr. (CCH) ¶ 50,464, but S. 397 and other proposals are designed to further reduce the international relations problems created by such litigation.

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